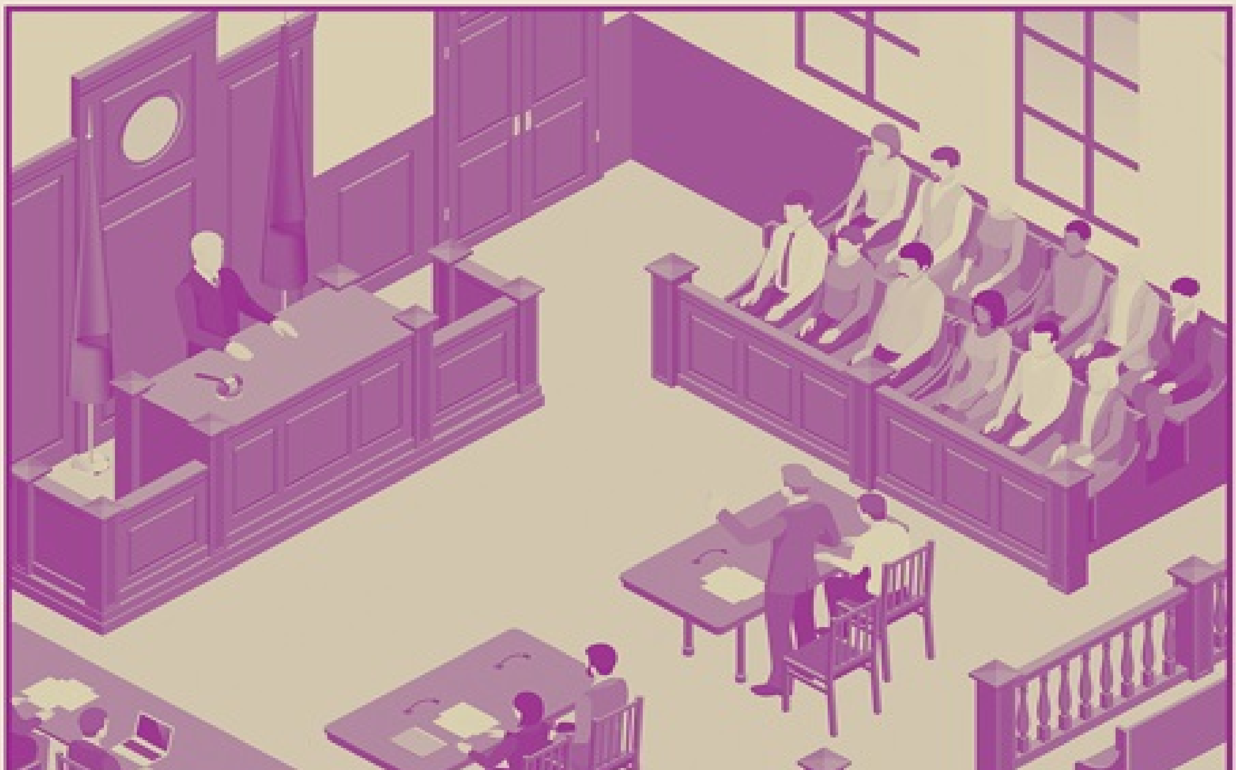
EXAMPLES & EXPLANATIONS

Evidence

Fourteenth Edition

Arthur Best



ASPEN PUBLISHING

Evidence

EXAMPLES & EXPLANATIONS

Tracey L. Meares
Walton Hale Hamilton Professor of Law
Director, The Justice Collaboratory
Yale Law School

Richard K. Neumann, Jr.
Alexander Bickel Professor of Law
Maurice A. Deane School of Law at Hofstra University

Robert H. Sitkoff
Austin Wakeman Scott Professor of Law
John L. Gray Professor of Law
Harvard Law School

David Alan Sklansky
Stanley Morrison Professor of Law
Faculty Co-Director, Stanford Criminal Justice Center
Stanford Law School

Evidence

Fourteenth Edition

EXAMPLES & EXPLANATIONS

Arthur Best
Professor Emeritus of Law
University of Denver
Sturm College of Law

ASPEN
PUBLISHING

To contact Customer Service, e-mail customer.service@aspenpublishing.com, call 1-800-950-5259, or mail correspondence to:

Aspen Publishing
Attn: Order Department
1 Wall Street
Burlington, MA 01803

eISBN 979-8-8890-6080-2

Library of Congress Cataloging-in-Publication Data application is in process.

About Aspen Publishing

Aspen Publishing is a leading provider of educational content and digital learning solutions to law schools in the U.S. and around the world. Aspen provides best-in-class solutions for legal education through authoritative textbooks, written by renowned authors, and breakthrough products such as Connected eBooks, Connected Quizzing, and PracticePerfect.

The Aspen Casebook Series (famously known among law faculty and students as the "red and black" casebooks) encompasses hundreds of highly regarded textbooks in more than eighty disciplines, from large enrollment courses, such as Torts and Contracts, to emerging electives, such as Sustainability and the Law of Policing. Study aids such as the *Examples & Explanations* and the *Emanuel Law Outlines* series, both highly popular collections, help law students master complex subject matter.

Major products, programs, and initiatives include:

- **Connected eBooks** are enhanced digital textbooks and study aids that come with a suite of online content and learning tools designed to maximize student success. Designed in collaboration with hundreds of faculty and students, the Connected eBook is a significant leap forward in the legal education learning tools available to students.
- **Connected Quizzing** is an easy-to-use formative assessment tool that tests law students' understanding and provides timely feedback to improve learning outcomes. Delivered through CasebookConnect.com, the learning platform already used by

students to access their Aspen casebooks, Connected Quizzing is simple to implement and integrates seamlessly with law school course curricula.

- **PracticePerfect** is a visually engaging, interactive study aid to explain commonly encountered legal doctrines through easy-to-understand animated videos, illustrative examples, and numerous practice questions. Developed by a team of experts, PracticePerfect is the ideal study companion for today's law students.
- The **Aspen Learning Library** enables law schools to provide their students with access to the most popular study aids on the market across all of their courses. Available through an annual subscription, the online library consists of study aids in e-book, audio, and video formats with full text search, note-taking, and highlighting capabilities.
- Aspen's **Digital Bookshelf** is an institutional-level online education bookshelf, consolidating everything students and professors need to ensure success. This program ensures that every student has access to affordable course materials from day one.
- **Leading Edge** is a community centered on thinking differently about legal education and putting those thoughts into actionable strategies. At the core of the program is the Leading Edge Conference, an annual gathering of legal education thought leaders looking to pool ideas and identify promising directions of exploration.

To Hannah, Rachel, and Eli

Contents

Preface
Acknowledgments

Chapter 1 The General Requirement of Relevance
Introduction
The Basic Standard and Its Application
Unfair Prejudice
Limited Admissibility
Conditional Relevance
Recurring Situations
Flight
Similar Happenings
Statistical Proof

Chapter 2 Specific Exclusions of Relevant Material
Introduction
Insurance
Subsequent Remedial Measures
Compromises and Offers to Compromise
Payments of Medical Expenses
Nolo Contendere and Withdrawn Guilty Pleas
Character Evidence
The Propensity Inference

Non-propensity Uses of Character Evidence
"Character in Issue"
Habit
Form of Proof Related to Character
Character of the Accused and the Victim
Character of the Sexual Assault Victim
Constitutional Restrictions on Exclusion of Defense Evidence
Summary of Anti- and Pro-propensity Evidence Rules

Chapter 3 Defining Hearsay
Introduction
Basic Rule

Basic Rationale for Excluding Hearsay
Detailed Analysis of Statements Typically Not Offered to Prove the Truth of What They Assert
Visual Aids
Detailed Analysis of What Constitutes a Statement
Classic Hearsay Puzzles

Chapter 4 Exceptions to the Hearsay Exclusionary Rule
Introduction
Statements Exempted from the Federal Rules
Definition of Hearsay
Opposing Party's Statements (Admissions)
Prior Statements by a Witness
Groupings of Hearsay Exceptions Under the Federal Rules
Statements Defined as Hearsay but Admissible Without Regard to the Declarant's Availability
Present Sense Impressions

Excited Utterances
Present Sense Impression and Excited Utterance Compared
Statements of Current Mental, Emotional, or Physical Condition
Statements for Medical Diagnosis or Treatment
Past Recollection Recorded
Business and Public Agency Records
Ancient Documents
Miscellaneous Exceptions
Statements Defined as Hearsay but Admissible if the Declarant Is Unavailable
Definition of "Unavailable"
Former Testimony
Dying Declarations
Statement Against Interest
Statement by Person Rendered Unavailable: Forfeiture by Wrongdoing
Residual Exception
Hearsay and the Confrontation Clause

Chapter 5 Examination and Impeachment
Introduction
General Competency Rules
Personal Knowledge

Children
Hypnosis
Spousal Testimony in Criminal Cases
Claims Involving Decedents ("Dead Man's Statutes")
Scope and Style of Examination

Leading Questions
Scope of Cross-examination
Form for Cross-examination Questions
Questions by the Judge
Statements of Opinion
Physical Location of Witnesses and Parties
General Right to Impeach
Impeachment by Showing the Witness Lied Intentionally
Convictions of Crimes
Past Bad Acts That Did Not Lead to Criminal Convictions
Evidence of Character for Truth-telling: A Permitted Propensity Inference
Timing for Proof of Crimes, Acts, and Character
Proof of Bias
Inquiry into Religious Beliefs Prohibited
Impeachment by Proof of Poor Perception or Memory
Impeachment by Contradiction
Prior Statements by a Witness
Impeaching a Hearsay Declarant

Chapter 6 Expert Testimony
Introduction
Topics for Expert Testimony
Qualification as an Expert
Reliability
Type of Data
Style of Testimony

Chapter 7 Privileges
Introduction
Attorney-Client Privilege

Defining “Communication”
Existence of the Lawyer-Client Relationship
Required Confidentiality
Purpose of the Communication
Allowable Privilege Claimants
Waiver

Issues Unique to Lawyer-Client Communications
Work Product
Spousal Communications
Physician-Patient
Therapist-Patient
Priest-Penitent
Governmental Executives and Informers

Chapter 8 Authentication and the Original Writing Rule
Introduction
Authentication
Witness with Knowledge
Handwriting
Distinctive Characteristics
Voices and Telephone Conversations
Public Records
Ancient Documents
Process or System
Self-authentication
Original Writing Rule
Definition of “Original”
Definition and Use of “Duplicate” Writings and Recordings

Excuses for Non-production of Original or Duplicate
Summaries

Chapter 9 Presumptions

Introduction
- Presumptions
- The Federal Rules Choice
- Production and Persuasion Burdens Defined and Compared
- Criminal Cases

Chapter 10 Judicial Notice

Introduction
- Adjudicative and Legislative Facts Distinguished
- Procedures for Judicial Notice

Chapter 11 Analyzing Exam Questions: Multi-Issue Essay and Multiple-Choice Questions

Introduction
- Techniques for Analyzing Essay Questions
- Techniques for Analyzing Multiple-Choice Questions

Appendix Federal Rules of Evidence

Article I. General Provisions
Article II. Judicial Notice
Article III. Presumptions in Civil Actions and Proceedings
Article IV. Relevance and Its Limits
Article V. Privileges
Article VI. Witnesses
Article VII. Opinions and Expert Testimony

Article VIII. Hearsay
Article IX. Authentication and Identification
Article X. Contents of Writings, Recordings, and Photographs
Article XI. Miscellaneous Rules

Table of Cases
Index

Preface

Evidence law is full of simple rules, complex rules, hard problems with satisfying answers, and hard problems that can never be resolved to everyone's agreement. This makes the subject difficult but rewarding. For a student beginning the course, "Participation precedes interest" might be a helpful slogan. Once you get involved with the course, you will like it, and you will master its various levels of complexity.

This text is designed to make participation easy. For every topic, it presents questions of different degrees of difficulty. It also provides clear explanations of how to analyze the questions. I hope you'll like this text, and I hope you'll like your Evidence course. Because evidence law can affect all areas of law practice, learning its rules and doctrines is a project that deserves your attention.

Arthur Best

February 2024

Acknowledgments

I am grateful to colleagues for reviewing parts of the manuscript, for sharing reactions to earlier editions, and for helping me to develop my understanding of evidence law in less formal ways as well. Thanks very much to Sheila Hyatt, Frank Jamison, and Randolph Jonakait. I have also benefited greatly from observing the diligence and energetic inquiry of Lilah Moren, Joel Moren, Edith Kil, and Alfred Kil.

This book is influenced strongly by the scholarship of the casebook authors whose works I have used in teaching. For their vital, though indirect, guidance, I would like to thank Ronald L. Carlson, Edward J. Imwinkelried, Eric D. Green, John Kaplan, Edward J. Kionka, Laird C. Kirkpatrick, Richard O. Lempert, Leon Letwin, David W. Louisell, Christopher B. Mueller, Charles R. Nesson, Stephen A. Saltzburg, Jon R. Waltz, and Olin Guy Wellborn III.

The support and skill of editorial colleagues has been vital to the writing of this text. In particular, thanks are due to Richard Heuser, Elizabeth Kenny, Carol McGeehan, and Peter Skagestad. Finally, I am grateful to the students who have shared comments on this book’s earlier editions. I appreciate their very helpful insights.

1

CHAPTER 1

The General Requirement of Relevance

INTRODUCTION

Learn a few simple rules and amaze your friends! There is much more than that to evidence law, but you do have to learn the basic structure to do well in an evidence course, the bar examination, or actual litigation. And it is only when you understand the explicit doctrines of evidence law that you can spot the sophisticated and complicated ambiguities that remain even after the adoption of a code, the Federal Rules of Evidence.

The logical starting place in the study of evidence is the concept of relevance. To be admissible, information must be relevant to a disputed issue. This concept is the foundation of evidence law. If someone sued a police officer for alleged police brutality, could you imagine the defendant's lawyer asking the plaintiff, "What's your favorite food?" That kind of question seems strange because a person's food preferences have nothing to do with evaluating a police officer's conduct. Knowing whether the plaintiff likes particular foods cannot legitimately help the trier of fact decide whether the police officer used too much force against the plaintiff, so evidence law keeps that information out of the trial. The question is improper because it refers to something that has no reasonable connection to the substantive doctrines that govern a police brutality suit. Almost every issue in evidence law involves relevance—the idea that the party who seeks to have evidence admitted must specify what issue it relates to and show how it rationally advances the inquiry about that issue.

This chapter begins our consideration of evidence law by exploring the way it divides all the facts of the world into two categories in every

2

case: relevant and irrelevant. Material must be relevant to be admitted into evidence at a trial. That highlights the importance of the relevance inquiry. But admissibility requires more than a showing of relevancy. There are important requirements for the form of testimony and the authentication of documents and the degree of knowledge a witness must have about the topic of testimony, for example. Succeeding chapters discuss these rules as well as others that exclude relevant material for reasons based on social policies such as rules of privilege, which protect confidential communications, and the rule against hearsay, which avoids basing trial results on unreliable secondhand information. The Federal Rules of Evidence will be the main focus. They apply, of course, in federal courts. Additionally, the vast majority of states have adopted evidence codes or rules modeled on the Federal Rules.

The Basic Standard and Its Application

The relevance rule restricts the trier of fact to considering only material that relates closely to facts that matter in the case. How close must the relationship be between an item of evidence and the proposition it is offered to support? The answer is necessarily vague: just close enough so the evidence could influence a rational fact finder in determining the truth or falsity of that proposition.

The Federal Rules have three main relevance provisions. Rule 402[1] requires that evidence be relevant to be admitted and that irrelevant evidence be excluded:

> Relevant evidence is admissible unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute;
> - these rules; or
> - other rules prescribed by the Supreme Court.
>
> Irrelevant evidence is not admissible.

Rule 401 provides the following definition of relevant evidence:

> Evidence is relevant if:
>
> **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> **(b)** the fact is of consequence in determining the action.

3

Another provision allows the trial judge to use discretion to avoid admitting evidence under certain circumstances, even when its admission would seem to be required under Rules 401 and 402. That provision is Rule 403:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

The relevancy concept saves time. It narrows the topics that parties have to develop in preparation for trial. Finally, it increases the perceived legitimacy of trials by ensuring that outcomes will be based on data most people would believe have something to do with the controversy.

Suppose a plaintiff sued the owner of an office building, claiming that he had fallen and hurt himself in the lobby and that inadequate maintenance of the lobby was the proximate cause of his injury. Should our trial system allow the plaintiff to show that the office building is one floor taller than the maximum height permitted by zoning regulations? The answer to this question depends on the substantive tort law that will govern the case. The evidence will be kept out because compliance with maximum height regulations has nothing to do with an owner's liability for injuries in a building's lobby. In technical terms it is immaterial since it does not involve one of the legal issues in the case. In the language of Rule 401, it does not deal with a fact that is "of consequence in determining the action." Could the plaintiff show that the lobby walls had once been painted pink but had been repainted yellow shortly before the injury? That evidence does relate to an issue at stake in the trial, the condition of the lobby, but it could not possibly influence a decision about the building owner's efforts to maintain a safe lobby. A court would keep it out, calling it irrelevant. How would a court treat evidence that the lobby was dimly lit? That information relates to an issue in dispute in a way that could help a fact finder decide rationally whether the owner had been adequately careful to provide a safe lobby. The evidence would be admitted.

For any relevance decision, the advocates and judge must have background information in mind, a context in which to evaluate whether the offered evidence has "any tendency," in the language of Rule 401, to affect the fact finder's resolution of a disputed issue. For example, in the lobby case, evidence that the lighting was dim seems relevant to us because we know (without its being proved or evidence about it being offered) that people trip and fall more often in dark places than in places that are brightly lit. This type of information about what the world is like is necessarily a part of every relevancy decision.

4

The judge decides questions of admissibility under common law and under the Federal Rules. Rule 104(a) provides:

> The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

Subdivision (b) of the Rule is discussed later in this chapter. Because relevancy is a condition for admissibility, it is one of the issues the judge is intended to decide by himself or herself. Notice that evidence can clear the relevancy threshold with a very small showing: The judge must believe that a rational fact finder could be influenced by the material in deciding the existence of a fact. Strong influence is not required. The evidence only has to be capable of making determination of the fact more or less probable than it would be without the evidence. Thus, relevance is different from sufficiency. In McCormick's famous phrase, "A brick is not a wall."[2] Where the contribution an item of evidence could make is very slight, however, the possibility increases that a judge will exclude it under the authority of Rule 403 as wasteful of time or needlessly cumulative. In this field, judges have discretion and are rarely overruled because factual situations are so diverse and there can be a wide range of ideas about the rational relationships between various kinds of information and facts sought to be proved.

Unfair Prejudice

Evidence is subject to exclusion if the risk of unfair prejudice substantially outweighs its probative value. Rule 403 uses those terms to frame the judge's discretion. To understand this balancing, it is necessary to define both unfair prejudice and probative value. If evidence will help an opponent, parties try not to introduce it. In this sense, all evidence that a party introduces is intended to prejudice the opponent, since it is meant to help the proponent's side of the case and hurt the opponent. It is only when a fact finder might react to aspects of evidence *in a way that is not supposed to be part of the evaluative process* that the reaction is considered *unfair* prejudice.

For example, the victim in an assault case could introduce testimony that the defendant ran toward him shouting, "Get over here! I'm going to break your arm!" Naturally, a juror might dislike a person who made such a statement and might therefore be prejudiced against him. This type of prejudice is proper because it comes from the juror's belief that the defendant committed the alleged aggression. On the other hand, if someone testified

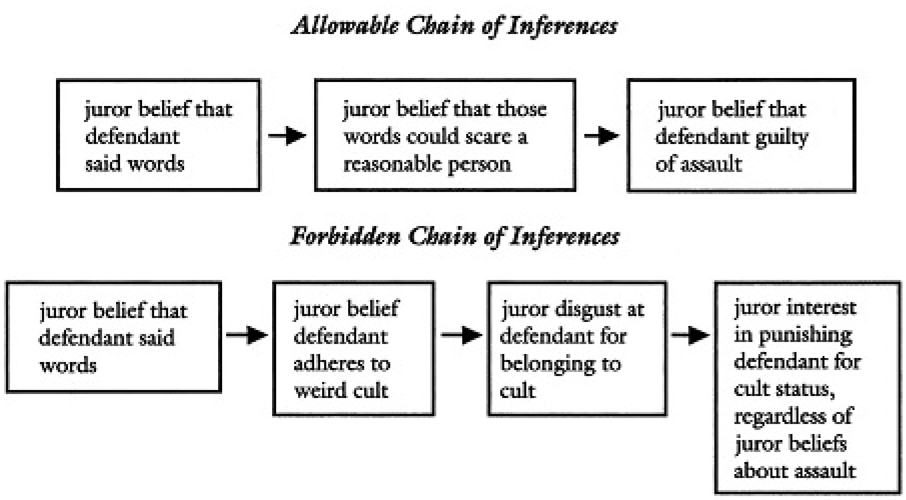
that the defendant said to the alleged victim, "I'm going to break your arm because I belong to a cult that worships violence," jurors might develop two kinds of ideas from learning about the defendant's worship of violence. They might relate the statement about religion specifically to the alleged crime and conclude that those words were part of the crime (in the sense that they reinforced the scary effect of the threat). Jurors might also develop negative impressions about the defendant based on their feelings of aversion to people who belong to weird cults. Those impressions would be an example of unfair prejudice since they are unrelated to the probative value the religion information has with respect to the charged crime. They flow from jurors' reactions to information about the person that would cause revulsion whether or not it was linked to the events of an alleged crime, not from a belief that the defendant did commit the crime. As

Chart 1 illustrates, jurors who believed that the statement was made could simultaneously draw two ideas from it. One would be that the defendant had committed the charged offense. The other would be that the defendant is a wretch and deserves to be punished no matter what. Obviously our system intends to have only the first kind of reaction, illustrated in the top row of Chart 1, play a part in the outcome of trials.

There is another type of unfair prejudice that the trial judge is authorized to consider under Rule 403. This is the risk that a juror will give undue probative weight to an item of evidence. For example, if there was a dispute

in a products liability case about whether a plaintiff's injury had really occurred the way the plaintiff claimed, the plaintiff might seek to introduce evidence that someone else had been injured in that same way. If the defendant argued that the plaintiff's claimed injury was impossible, letting the jury know that someone else had been hurt that way would be proper since the jury could use that information to evaluate the defense of impossibility. A different treatment would be sensible if the defendant admitted that the type of accident claimed by the plaintiff was possible, but claimed that the plaintiff just had not been injured in that way. In that case, proof that one other person had been hurt that way would have only a small bearing on the likelihood that the plaintiff's claim was true, but there is a risk that jurors might believe that because something happened one time it was highly likely to have happened another time. In a case where a defendant acknowledged that the plaintiff's theory was possible, admitting evidence about a single other incident of the type claimed by the plaintiff would subject the defendant to a risk that the jury would give it too much weight.

Chart 1 **Simultaneous Inferences from Evidence That Defendant Said, "I'm Going to Break Your Arm Because I Belong to a Cult That Worships Violence"**



To determine whether the risk of unfair prejudice substantially outweighs the probative value of evidence, a judge is required to do some kind of weighing. This process is not literally a measurement since there is no scale for quantifying degrees of probativeness and prejudice. In the worshipping violence example the judge would consider the other evidence the prosecution had that connected the defendant to the crime. If the prosecution had other evidence that did not entail a reference to violence worship, the probative value of that violence reference would be slight. If the judge were to instruct the witness outside the hearing of the jury that the "break your arm" statement could be repeated but that the "cult" statement must be kept from the jury, this would ensure that the prosecution had access to an important part of its case against the defendant. Additionally, it would avoid the risk of providing the jurors with information that might affect them improperly.

Appellate courts usually defer to trial court rulings based on Rule 403. Even if evidence has only slight probative value, an appellate court will rarely reject a trial court's ruling that its legitimate value exceeds the risk of unfair prejudice associated with the evidence. An unusual case, *Old Chief v. United States*,[3] illustrates how slight the probative value of evidence may have to be for an appellate court to rule that it is less than the risk of unfair prejudice. In *Old Chief*, the defendant was accused of the crime of being a felon in possession of a firearm. The defendant admitted that he was a felon, but the trial court allowed the introduction of detailed evidence about the defendant's earlier crime. This was erroneous. A full description of the prior offense had no probative value, because the defendant had conceded that he was a felon. In contrast, criminal defendants accused of violent crimes almost

7

always seek to stipulate to the nature of wounds or other injuries suffered by the victim, but prosecutors are usually allowed to introduce gruesome photographs illustrating them. Appellate courts typically hold that a stipulation cannot fully convey the nature of the harms inflicted on the victim, so the photographs are considered to have probative value that exceeds the improper emotional effect that they create.

Examples

1. Why might rich defendants in civil cases or guilty defendants in criminal cases prefer an evidence system that did not impose a requirement that evidence be relevant?
2. Imagine a patent infringement suit. The plaintiff claims that the defendant has begun to sell a pen with an ink supply system that copies a system patented by the plaintiff more closely than patent law allows. To prove patent infringement, can the plaintiff introduce

testimony that the defendant company recently moved its headquarters from one city to another?

3. Suppose the plaintiff in Example 2 offers testimony that the defendant's president bought one of the plaintiff company's pens, wrote with it, and said that he would like to invent a pen that worked as well. Would evidence of that statement be relevant?

4. In Example 2's lawsuit, suppose that the defendant company's president had paid to have a sadistic thug beat up the plaintiff and make the plaintiff tell him how to set up a production line that could make pens using the plaintiff's patented design. Could the plaintiff testify about the beating?

5. *X* is on trial for stealing a 1957 DeSoto automobile worth about $30,000 to collectors of classic cars. To show motive to steal and knowledge of the DeSoto's value, can the prosecution introduce evidence that *X* has a collection of classic cars?

Explanations

1. In a system where irrelevant evidence as well as relevant evidence was admissible, trials could last forever since only a party's endurance or financial resources would limit the amount of evidence the party could present. Theoretically, a civil defendant in a suit where the cost of losing would be very high would find it in its interest to delay the end of trial for as long as possible. The same reasoning would apply to the guilty criminal defendant, who might well prefer daily attendance at court to serving a prison sentence.

On the other hand, the relevance principle can help defendants by preventing the jury from finding out facts about them that might make

8

them seem unattractive: the immense wealth of a corporate defendant or a criminal defendant’s long record of prior convictions.

2. No. The location of the defendant’s headquarters has nothing to do with how our legal system treats the right to use particular patented inventions, so the judge should reject the testimony. Note that the judge decides questions of relevance.
3. This testimony does relate to the parties’ pens. But would it help a jury decide whether the pen actually manufactured by the defendant made improper use of the plaintiff’s patented invention? Its probative value is very low on the issue of patent infringement, and there might be a risk that a jury would fail to distinguish between a desire to imitate a product and a plan to misuse patented aspects of a design. Either decision made by a judge on this evidence—letting it in or keeping it out—would probably be affirmed on appeal.
4. Yes. The fact that the defendant company sought information about how to use the patented design could logically support a conclusion that the product it eventually manufactured was very close in specifications to the patented product. The fact that the defendant hired an evil person to use force against the plaintiff might cause jurors to be inclined to rule for the plaintiff just to punish the defendant for the use of force rather than because of its evaluation of the patent law

issues. Nevertheless, there is a strong argument for admitting this evidence. If the plaintiff’s case had lots of other evidence about the patent infringement, then it is possible that under Rule 403, a judge might decide to exclude information about the beating. But because the beating is so closely related to the defendant’s manufacturing plans, it is highly likely that testimony about it would be admitted.

5. Yes. Proof that *X* collects cars would not support a verdict of guilty in the theft case if it were the prosecution’s only evidence. But evidence does not have to be conclusive to be relevant. If *X* is interested in classic cars, does that make the propositions that he stole a classic car or that he knew the worth of the car more likely to be true than they would be without that information about *X*’s interest? If the judge believes that the answer to this question is yes, then the evidence is admissible.

Limited Admissibility

Sometimes an item of evidence is relevant to one issue in a case and *has no relationship at all* to another issue. In that circumstance, the evidence passes the relevancy hurdle. No single piece of evidence is expected to be relevant to all the disputed issues of a case. The situation is more complicated when

a single item of evidence is relevant to one issue in a case and is a type of evidence *forbidden to be considered* with respect to another issue. For example, a specialized relevancy rule prohibits admission of evidence of an alleged tortfeasor’s subsequent remedial measures to prove negligence. Such remedial actions can be relevant and admissible, however, on issues other than the quality of the defendant's care. They could relate, for example, to the issues of ownership or control of the site where the injury occurred.

If a tort plaintiff seeks to introduce evidence that qualifies for the permissible relevance of showing that the defendant had control of a place where the plaintiff was hurt, our legal system is placed in a difficult position. It must deal with the possibility that a jury will make use of that information not only for the permitted purpose but also for deciding the defendant's culpability—even though a specific rule prohibits introduction of this kind of evidence to show culpability. There are two possible resolutions of the circumstance where evidence has one permissible use and another impermissible use. We could keep the evidence out. This would guarantee that the jury would not make a wrongful use of the material but would also guarantee that the proper, permitted use of the information would not occur. The other choice, which is typically the choice made by trial judges, is to let the material in and give the jury a cautionary "limiting" instruction. The limiting instruction would tell the jurors to consider the information only with respect to the topic for which it is legitimately admitted. This allows the proper use of the information, consistent with the pro-admissibility trend of modern evidence law in general and the Federal Rules in particular, while it decreases somewhat the risk that the jury will use the information improperly.

Conditional Relevance

Sometimes an item of evidence *by itself* will have no relevance to any issue in a trial but would be relevant if the trier of fact also had some other information. Rule 104(b) governs this situation:

> **Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

To illustrate, suppose in a murder trial the prosecution sought to show that the defendant owned a red hat with a blue feather. If an eyewitness saw the murderer run from the scene wearing that kind of hat, then information about the defendant's hat would be significant circumstantial evidence of guilt. Notice, however, that the relevance of hat ownership is only apparent if there is testimony from the eyewitness. This is called "conditional

relevance." The relevance of the testimony about the defendant's hat comes from the context provided by the information from the eyewitness. Judges are supposed to admit evidence of this kind if its proponent has already produced the other material that shows its relevance to the trial or if the proponent promises to produce that contextual information later. We leave it to the jury to decide whether the underlying context has been proven adequately to support consideration of the conditionally relevant information.[4] This process is mandated in Rule 104(b), which defines the situation as one in which "the relevance of evidence depends on whether a fact exists."

In the red hat illustration, the jury will make a decision about the reliability of the eyewitness testimony. If it believes that the murderer really did wear a red hat with a blue feather, it will go on to consider whether it believes the testimony which stated that the defendant owns a hat like that. If the jury does not believe that the eyewitness saw that kind of hat, it will pay no attention to the testimony it heard about the defendant's hat. Knowing that the defendant had a peculiar hat would be of no interest to a juror who did not believe that such a hat was seen at the time of the murder.

The judge does continue to have a role in the conditional relevance situation if it turns out that the proponent of the conditionally relevant information fails to produce the extra material that relates the conditionally relevant information to the case. In the red hat illustration, if the prosecutor failed to introduce eyewitness testimony about the murderer having worn a red hat, then the judge could instruct the jury to ignore whatever it had heard about the defendant’s possession of a red hat. This instruction, of course, would only tell the jury to do what it would most likely have done without a specific warning, since ignoring the defendant’s red hat would be natural if there was no testimony that made a red hat important to any aspect of the case.

Examples

1. In a suit between an ice cream company and the creator of a special recipe, the recipe creator claims that the ice cream company paid too little in royalties and falsified its reports of the costs of manufacturing and sales. To show that the company defrauded him, the recipe creator wants

   11

   to introduce a tape recording that he claims contains a discussion by two officers of the company about the amount of profits from “this season’s big project.” The company objects to admission of the tape recording, claiming that “this season’s big project” meant a new kind of packaging, not a recipe, and that therefore the tape is not relevant to the plaintiff’s case. Discuss how the plaintiff might argue for admissibility of the tape.

2. The use of coerced confessions in criminal trials is prohibited. If a defendant objects to the admission of a confession on this basis, should the judge treat the question of whether the police used coercion as a conditional relevance issue that the jury should resolve?
3. In a rape case, the alleged victim testifies that the defendant said, “Come with me and do what I say. I’m serious. I’ve already been in prison for rape twice before.” Is this testimony relevant to any issue in a rape case? Does it raise problems of unfair prejudice?

Explanations

1. The plaintiff would have to be able to tell the judge in good faith that he had some additional evidence showing that the conversation really involved his recipe. If the people talking on the tape were discussing packaging, then the tape would have nothing to do with the current case. If the taped executives really were discussing the plaintiff’s recipe, then the information would be relevant. This is an example of conditional relevance, and the judge would properly admit the tape recording. The fact finder would consider the tape recording only if there was also persuasive evidence supporting the plaintiff’s claim about what the speakers meant by “this season’s big project.”
2. This objection involves a factual issue about the making of the confession. But the objection does not involve the concept of relevance since the defendant is not, for the purpose of this objection, contending that the confession lacks a relationship to guilt or innocence. The defendant, for this objection, is claiming

inadmissibility on the basis of a particular rule that keeps coerced confessions out of trials. The judge would decide whether the circumstances of the making of the confession were legitimate or involved forbidden coercion. If the judge decides that there was coercion, the confession would stay out and the jury would never hear about it.

If this were mistakenly treated as a conditional relevance situation, there would be an absurd result. The jury would be asked to decide whether a confession had been made voluntarily and would then be told to ignore the confession if it decided that the confession had been coerced. Notice that this puts the jury in a difficult position.

12

A juror would be told to ignore a confession he had learned about if he decided that a preliminary factual condition our system imposes— voluntariness—was not satisfied. A juror might be able to do that, but it would require extraordinary concentration and dedication to the values on which the constitutional rule is based. In a true conditional relevance situation, jurors are never asked to do anything counterintuitive. When they are supposed to ignore information it is highly likely they will do so, because the information will not seem to them to have anything to do with the case. In the analysis of Example 1, no juror would think about the tape recording in connection with the current suit unless the juror thought the information on it involved the plaintiff's recipe. Otherwise it would not make any sense to use information about packaging to think about profits from the plaintiff's recipe. Confession cases are different. In those cases, it *would* make sense to think about the confession even if it had been coerced because some coerced confessions are accurate. That is why we protect defendants from being tried by jurors who have heard about their confessions in a case where the confession was coerced.

3. If there is dispute about whether the victim consented to intercourse, testimony that the defendant used coercive language would be relevant. Since the defendant's own words happen to reveal facts about his past that could cause the jury to want to punish him for that past rather than for the crime for which he is being tried, there is a possibility of unfair prejudice. The balancing test, weighing the probative value of the information against the risk of unfair prejudice, would lead to admission of the evidence, because there is not likely to be any way to prove the method of coercion other than by proving what words the alleged rapist said. Thus, the probative value of the words would be great. The risk of unfair prejudice would be treated with a limiting instruction, telling the jury to consider the words only on the issue of coercion and prohibiting the jury from considering whether or not the defendant had actually been imprisoned for rape in the past. (The problems presented by evidence of past convictions are covered by a set of specialized rules, which are discussed later in this chapter.)

Recurring Situations

Some factual propositions are involved in so many trials that precedents have developed for handling the kinds of evidence parties seek to introduce about them. Examples of these relevance inquiries are an effort to suggest that a person is guilty of a charged crime by showing that he fled the jurisdiction when arrest was imminent, or fled after arrest; use of similar occurrences to show what happened on a particular occasion; and use of statistical probabilities to prove that an event occurred.

13

Flight

Courts usually reason that fleeing the jurisdiction supports an inference that the defendant believed he or she was guilty, and that this supports another inference that the defendant in fact was guilty. On this analysis, flight is usually admitted as relevant to guilt. Counterarguments that are not usually successful maintain that flight should be excluded because it may show only fear of wrongful conviction, and because even a belief in guilt may not truly indicate guilt under the detailed substantive standards applicable to any given crime. A similar approach is taken to evidence about destroying evidence or trying to obtain perjured testimony.

Similar Happenings

Evidence of similar happenings is sought to be admitted in many trials. In criminal trials, prosecutors may seek to introduce evidence that a defendant has committed prior acts that are similar to the charged offense. This issue is treated in connection with “character evidence,” at pages 32-40.

In tort cases, typically an accident victim will offer testimony that other people had been injured in the same way on previous occasions. This information might be relevant in a variety of ways depending on the underlying theory of the plaintiff's case. This can be illustrated with the case of a plaintiff who claims he was injured when the cap of a soft drink bottle flew off under pressure as he opened it. Proof of a significant number of similar past occurrences involving bottles sold by the defendant would support the plaintiff's contentions that (1) his injury actually was caused by a bottle cap, (2) the bottle cap was dangerous, (3) the defendant had notice of the dangerousness of the product, and (4) the defendant had an opportunity to correct the problem. Note that all of these theories of relevancy would apply in a case based on negligence, but some of them would not work in a strict liability case. Since strict liability will be imposed regardless of a defendant's notice or "wrongful conduct" in not correcting a dangerous situation, the plaintiff could not argue for the relevance of information about past injuries by claiming it showed notice to the defendant or that it supported a claim that the defendant should have acted to correct the problem. In all relevance situations, the basic substantive law or the proponent's theory of the proponent's case will have a major effect on the judge's decision on admissibility.

In determining the relevancy of similar occurrences evidence, a court will examine the surrounding circumstances of the previous incidents to compare them with the alleged facts of the incident that is the subject of the trial. If the earlier events took place under conditions with

characteristics that were similar to the conditions present at the time of the event that is the basis of the suit, information about them will be considered relevant. The proponent's legal theory will affect which and how many characteristics in the past events and the litigated event must be similar to each other.

In the bottle cap example, a plaintiff who seeks recovery on negligence grounds could claim that past incidents were relevant with regard to notice. On that theory, the degree of similarity between the event that harmed the plaintiff and other earlier events could be less than would be required if the past events were claimed to be relevant to show how the plaintiff's injury occurred or to show that the product feature that harmed the plaintiff was negligently designed. If the plaintiff pleaded only a strict liability case, the plaintiff would have no basis for arguing that the past injuries were relevant to show notice. They could only be relevant to show that the plaintiff's injury really occurred in the way the plaintiff claims (by showing that the plaintiff's description of how the injury took place matched the details of past occurrences) and that the product design was hazardous. For those purposes, a high degree of similarity between the plaintiff's incident and the prior incidents would be required.

Information about similar past occurrences raises a subtle issue of the distribution of decision making between the judge and jury. This evidence is really an example of conditional relevance since information about the past events will be relevant only if a certain factual proposition is proved adequately: the similarity of settings between the past and litigated events. On this analysis, then, the judge should let the material into the trial if a juror could reasonably decide that the past event and the event being litigated are similar enough so that information from the past event could help the juror decide what really happened in the event being litigated. In theory, jurors will ignore what they learn about past mishaps if they consider them unrelated to the event examined in the trial. Even where proof of the closeness of circumstances is weak, the conditional relevance analysis leads to the idea that the judge should give the jury an opportunity to evaluate the evidence.

A further analysis is based on the fact that evidence of past injuries may be highly prejudicial. Jurors who hear about injuries to people other than the plaintiff may be inspired to make the defendant pay money to the plaintiff even if they are not persuaded there really was negligence in the plaintiff's instance. This argues against adopting a generally pro-admissibility stance on the issue of past occurrences. So even though evidence of past occurrences could be treated as an instance of conditional relevance, with most of the decision making left to juries, judges properly exclude the evidence unless they are persuaded that the showing of similarity of conditions is strong.

15

Statistical Proof

Another type of evidence that parties sometimes seek to introduce is testimony by experts about the probability of events. In a famous case of this type, *People v. Collins*,[5] a married couple were criminal defendants charged with robbery. The husband was a black man who sometimes wore a beard, and the wife was a white woman with blond hair. Eyewitness testimony supported the contention that the robbers were a black man with a beard and a white woman with blond hair. An expert in statistics testified for the prosecution about the probability of occurrence of many factors in the case, such as a couple being composed of two people with the combination of racial and other physical appearance attributes of the defendant couple.

The California Supreme Court found a number of problems with this. First, in calculating probabilities, it is necessary to have some empirical basis for assigning values to any event. The expert witness in *Collins* merely made guesses about the frequency of occurrence of the attributes he used for his calculations, such as how many black men have beards and how many do not. Another problem was that in calculating probabilities of combinations of different variables, the variables must be "independent." That requirement was not met in the expert's testimony. Finally, the court was concerned that jurors might improperly confuse the probability of a couple possessing the traits possessed by the defendants with the probability that the defendants were not guilty. All of these considerations led the court to be strict about the requirements of scientific accuracy in this kind of testimony because there is a strong likelihood that it will be very impressive to juries.

More modern cases involving DNA evidence raise the same problems concerning the basis and interpretation of statistical proof. For example, jurors might mistakenly believe that the rarity of a particular DNA profile is equivalent to the likelihood that a defendant committed the crime with which the examined DNA was associated. Nonetheless, it is common for courts to allow testimony like “the odds of a match between a random sample and the sample from the crime are only 1 out of 10,000,000.”

Examples

1. A plaintiff who claimed he had been injured on the defendant’s ship planned to introduce a statement from a sailor who said he had seen the injury occur. The plaintiff, the plaintiff’s lawyer, and the defendant’s lawyer all participated in obtaining a deposition from the sailor. On the day after taking the deposition, the defendant located crew lists showing

16

that the “eyewitness” had not been on board the ship on the day of the injury. The plaintiff’s lawyer then informed the court that he would not seek to introduce the “eyewitness” statement. The *defendant* then stated that he wanted to introduce it to show “fraud.” The court replied:

> Well, I’m not going to permit you to do that. I’m going to say that if this person perjured himself

> then we can do one of several things, one of which we can report it to the United States Attorney for perjury, for purposes of perjury, because it was done to influence the outcome of this case. I think that's the appropriate procedure. I don't think we are going to start introducing a document [that] you think is incorrect and intentionally incorrect in this case. . . . If it is not brought in [by the plaintiff] then I don't say it's an issue in this case for this jury to consider whether or not the plaintiff is involved. I don't know whether the plaintiff is involved in this matter. That's whose case we're trying. We're trying the plaintiff's case.[6]

The judge was wrong. Why?

2. Warren Webster seeks damages from an amusement park, claiming that his arm was broken when one of the amusement park rides came to a sudden stop and threw him against the side of one of its cars. Webster claims that the ride was carelessly designed and carelessly operated. He also claims that the defendant amusement park should have known about the risks that the ride presented and was negligent in failing to warn about them or correct them. If Webster had evidence that other people had been hurt on the ride in the same way he claims he was hurt, it would be admissible provided that the circumstances of the earlier injuries were similar to the circumstances of Webster's injury. What if the amusement park's manager knows that in ten years of operation no one besides Webster has claimed to have been injured by the ride, and the manager knows of no other injuries?

How would you argue for admissibility of this evidence of prior safety?

3. The plaintiff was hit by a carelessly driven armored truck. Unfortunately, the driver drove away from the scene of the accident. The plaintiff could not see a company's name on the truck, but remembers that it was blue. There are two companies using blue armored trucks in the area where the accident occurred; one of them has 90 trucks and the other has ten trucks. The plaintiff sues the 90-truck company claiming that there is a 90 percent chance that one of its trucks hit him. If there is no other evidence about the identity of the truck in the accident except the victim's testimony about its color and evidence showing that 90 percent of the blue armored trucks in use belong to the defendant, should the plaintiff's case get to the jury or is the defendant entitled to a directed verdict?

17

Explanations

1. If the jury believed that the plaintiff had known that the "eyewitness" statement was phony, the jury could infer from that belief that the plaintiff considered his case so weak that it needed help from perjured testimony. That inference could properly assist the jury in deciding whatever disputed issues of fact were involved in the case.

   The judge might have been on firmer ground if he or she had ruled that the evidence was relevant but inadmissible because without a strong link between the plaintiff personally and the attempted perjury, there are risks of wasting time and confusing the jury.

2. For the prior safe operation of the ride to be admissible evidence, the manager would have to establish that the circumstances at the time Webster claims to have been injured were highly similar to the circumstances during all the prior period about which the manager has knowledge. "Similarity" here must be interpreted to mean that the prior circumstances and the circumstances when Webster was hurt did not differ in ways that could affect safety. If that similarity is established, then safe operation in the past is directly relevant on the issue of notice since it would have suggested to the defendant that the ride was safe (not that the ride was dangerous as the plaintiff claims).

   Safe operation in the past also would support a claim by the defendant that the plaintiff is mistaken or lying about how or where his injury occurred, because a history of safe operation suggests (although it does not prove conclusively) that the ride does not cause injuries the way the plaintiff claims it did. Finally, it could support the amusement park's general contention that the ride is reasonably safe even if it did cause harm to the plaintiff on one occasion.

3. Some courts would let this plaintiff get to the jury on the probability theory. There is not really any risk that the "statistical" evidence will be overpoweringly technical and too hard for jurors to refute with their own common sense. And information about which company with blue armored trucks owns the most blue armored trucks does relate to the question of which company's truck was involved in the accident. Yet some courts

would hold that the inference one could base on the statistics is so slight that the evidence should be treated as not relevant. They might also treat the information as relevant but subject to a significant risk that the jury will give it inappropriately heavy weight; this would unfairly prejudice the defendant and could be a separate rationale for excluding the evidence.

Courts may be reluctant to create a situation in which a judgment is entered in a case that might seem entirely theoretical or suppositional

18

to the general public. That point of view ignores the fact that most cases involve only evidence that is subject in varying degrees to error or that is based on implicit estimates of probability. Nonetheless, while a case based on eyewitness testimony may be more likely to produce the wrong result than a case based on 90 percent odds such as the problem case, many courts tolerate the risk in the eyewitness case but would be reluctant to acknowledge that probability evidence has equal reliability. (In *Kaminsky v. Hertz Corporation*, 288 N.W.2d 426 (Mich. Ct. App. 1979), the court faced a problem like the one in this question, but its task was made easier because the plaintiff remembered seeing the defendant's name on the truck. Even though some trucks with that name were not owned by the defendant, the court relied on substantive theories connected with the obligations an enterprise must bear if it allows its name to appear on trucks other than those it owns.)

1. Throughout this book, Rule numbers refer to provisions of the Federal Rules of Evidence.

2. Charles T. McCormick, McCormick on Evidence 339 (John W. Strong, ed., 4th ed. 1992 (abridged ed.)).

3. 519 U.S. 172 (1997).

4. Conditional relevance is recognized in the Rules, and judges and litigators are usually comfortable with the concept. Nevertheless, some scholars argue that the concept is analytically unsound. They point out that the relevance of *any* evidence depends on other items of evidence or other information. Whether information about the defendant's hat should be part of the jury's consideration in the hypothetical murder case is left to the jury, under the Rules. The jury will decide whether or not to think about it. In contrast, if evidence of a hatred between the defendant and the victim were introduced, the relevancy decision would not be treated as involving the Rules' concept of conditional relevance. The judge would admit it unconditionally, relying on his or her own belief that hatred is often a motive for murder.

5. 68 Cal. 2d 319, 66 Cal. Rptr. 497 (1968).

6. McQueeney v. Wilmington Trust Co., 779 F.2d 916, n.3 (3d Cir. 1985).

CHAPTER 2

Specific Exclusions of Relevant Material

INTRODUCTION

Judges have great discretion in applying the relevance requirement and the safeguard that excludes relevant but unfairly prejudicial information. However, in certain specific circumstances they are required to keep evidence out despite its logical relevance. These are situations where the likelihood of unfair prejudice from particular types of evidence is considered so extreme that it cannot be risked or where social goals unrelated to the truth-finding process are more important than the contribution that particular types of evidence could make to that process.

Insurance

The rule regarding evidence of insurance is one of the simplest of these specialized relevance rules, so it is a good one to consider first. Rule 411 states:

> Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

This rule is based on a fear that jurors who know a party has insurance may find that party liable only because they believe the liability will be cost-free to the party, or that jurors will increase the amount of damages they find, secure in the belief that only an insurance company will be affected adversely. It could be argued that proof that a party has insurance does have logical relevance to the question of how carefully the party acted on a specific occasion, if one believed that people who know that they will not be financially responsible for injuries they might inflict might be more willing to take chances than people who expected that they would have to pay personally for harms they caused. That likelihood is probably slight, however. This possible logical relevance is outweighed by the fear that insurance information will distort a jury's willingness to assign liability according to a fair-minded evaluation of evidence in terms of the judge's instructions.

As a matter of fact, jurors may well have suppositions about parties' insurance, and if that is so, it might be more sensible to give them accurate information than it is to leave them to their own guesswork. This argument strikes at the reasonableness of the exclusionary rule. In circumstances where insurance information comes out at trial by error, appellate judges who decide whether the error was significant enough to require retrial may be influenced by this possible weakness in the rationale for the rule. However, at common law and under the Federal Rules, the doctrine is clear, and compliance with it is not a matter of judicial discretion.

The Rule does not prohibit all possible uses of evidence about a party's insurance coverage. If it can support findings about topics other than negligent or wrongful conduct, evidence of insurance coverage is permitted to be introduced. For example, if a defense witness works for the defendant's insurance company, information about the witness's possible financial bias would be permitted to be introduced, despite the fact that it would inform the jury about the defendant's insurance coverage.

Subsequent Remedial Measures